Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

Supreme Court of the United States

October Term, 1977

No. 76-1835

IKE SLODOV,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

BENNET KLEINMAN
LAURENCE GLAZER
1300 Bond Court Building
Cleveland, Ohio 44114
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

Supreme Court of the United States

October Term, 1977

No. 76-1835

IKE SLODOV,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

Contrary to Respondent's implications at page 14 and elsewhere of its Brief, Petitioner does dispute the interpretation and application of principles set forth by Respondent.

Respondent takes exception to Petitioner's reading of the language of Section 6672. That Section is clearly written. It first describes the person within its scope and next defines the actions by such person which give rise to its prescribed penalty:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts

in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

In order to bring Petitioner within the reach of Section 6672, Respondent argues that Petitioner need not be the person described in the Statute *at the time* the taxes in issue were required to be collected, truthfully accounted for, and paid over to the United States. According to Respondent's position, the Statute is satisfied if Petitioner was a person required to collect, truthfully account for, and pay over any tax, at *any* time, no matter when the tax liability arose. Respondent does not attempt to justify this reading of the Statute with any authority. Rather, it takes its interpretation of the Statute for granted and seeks to fix liability upon the Petitioner because, when he became a so-called "person" described in the Statute, he failed to "truthfully account for and pay over" certain taxes arising prior to the time he became a responsible officer. In order to justify this untenable interpretation of the Statute, Respondent looks to the words "such tax" contained in that part of the Statute defining acts giving rise to the prescribed penalty, and suggests that such words have the same meaning as "any tax imposed by this title" appearing earlier in the Statute. Thus, Respondent concludes that the language of Section 6672 does not refer to the tax or tax dollars for which the alleged violation relates, but refers instead to "any tax" arising at any time. Petitioner respectfully disagrees with Respondent's convoluted reading of Section 6672. The wording "any tax imposed by this title" appearing in the first part of the Statute describes the type of tax that can be the subject of the penalty and can logically be read

only in conjunction with the wording preceding it, i.e. any tax imposed by this title which is required to be collected from others, truthfully accounted for, and paid over to the United States. If separately read, as Respondent argues, without the limitation herein contended for by Petitioner, "any tax imposed by this title" would, for example, include corporate income and other taxes clearly beyond the scope of Section 6672 and cast personal liability on responsible officers therefor. Thus, the words "such tax" means "any tax imposed by this title" required to be collected by the particular person with whom we are dealing. Obviously, Petitioner was not required to collect the taxes accruing prior to February 1, 1969.

Respondent also argues by means of a hypothetical example at pages 16 and 17 of its Brief, that Petitioner's reading of Section 6672 would frustrate the purpose of the Statute by allowing responsible persons otherwise subject to its provisions to escape its reach by timely shifts in responsibility. This is simply not a correct interpretation of Petitioner's position and Respondent's example fails to consider judicial replies to such situations.

There is no dispute that Section 6672 was enacted to provide the United States with an alternative means of recourse of collecting certain taxes by imposing a one hundred percent (100%) penalty on those persons who may have breached their fiduciary obligation to maintain a special trust fund for the benefit of the United States. Petitioner fully supports the purpose of Section 6672 and agrees that those persons responsible for violations of their fiduciary duties should not escape liability. Petitioner, however, did not violate any fiduciary responsibility and Respondent's claim that he did is without merit. The record of this case clearly demonstrates that if any diversion of "withheld" funds occurred, such actions were

those of Petitioner's predecessors, and not Petitioner. Respondent's efforts to attach liability upon Petitioner for events preceding his involvement and beyond his control are unjustified. In *Louisville Credit Men's Ass'n, Inc. v. United States*, 73-2 U.S.T.C. ¶9740 (E.D. Ky., 1970), a case factually similar to the present one, the Court recognized the problem of strategic shifts in responsibility but refused to impose a Section 6672 penalty upon a person who was not responsible for the events giving rise to the alleged defalcation. The Court, in part, says:

> ". . . the statute would be emasculated beyond the ordinary meaning of its words if it were construed so as to allow those who would otherwise be within its purview to exempt themselves by stratigically [sic] timed shifts in responsibility, *it is equally apparent that the statute is not intended as a basis for imposition of penalties as a result of events substantially beyond the control of the one against whom such imposition is sought.*" [Emphasis ours.]

The cases of *Teel v. United States*, 76-1 U.S.T.C. ¶9190 (9th Cir., 1976) and *Tiffany v. United States*, 228 F. Supp. 700 (N.J., 1963) cited to this Court in Petitioner's original Brief, provide clear solutions to the problem of strategic shifts raised by Respondent in its hypothetical example.

Respectfully submitted,

KAHN, KLEINMAN, YANOWITZ & ARNSON
Co., L. P. A.

BENNET KLEINMAN
LAURENCE GLAZER
1300 Bond Court Building
Cleveland, Ohio 44114
(216) 696-3311
Counsel for Petitioner